



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1242 /2016

In the matter between:

GABRIEL MOTHUSI TAKU

Applicant

and

THABO SEKHANISA N.O

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

SOUTH AFRICAN AIRWAYS (SOC) LTD

Third Respondent

Heard: 2 August 2018

Delivered: 22 January 2019

Summary: Review application. Arbitrator accepted hearsay evidence and the award is to be reviewed and set aside.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 8 May 2016 under case number GAEK 10374 -15 wherein the First Respondent (the arbitrator) found the Applicant's dismissal substantively and procedurally fair and dismissed his case.
- [2] The Applicant also seeks condonation for the late filing of the review application. I have considered the application for condonation and I am satisfied that a case has been made out for the granting of condonation.
- [3] The Third Respondent, the South African Airways (SOC) Limited, (SAA) opposed the application.

Background facts

- [4] The Applicant commenced employment with the SAA in December 2000 as a customer service agent. It was common cause that the Applicant had worked for the SAA for a period of 15 years and that he had a clean disciplinary record. In August 2015, he was charged with three counts of misconduct relating to an incident which occurred on 19 April 2015 when the Applicant allegedly solicited a bribe from a passenger. The Applicant was dismissed in November 2015, after being found guilty of misconduct in a disciplinary hearing.
- [5] The employee subsequently referred an unfair dismissal dispute to the Second Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the matter was arbitrated in April 2016.

The evidence adduced:

- [6] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively and procedurally fair. The arbitrator found the employee's dismissal fair in both respects. It is evident from the grounds for review raised by the Applicant that there is no challenge in respect of the finding on procedural fairness and thus it is not an issue to be considered by this Court.
- [7] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the reason the employee was dismissed for and the evidence adduced at the arbitration proceedings.

The employee was dismissed on three counts of misconduct, all relating to the incident of 19 April 2015 and involving the passenger Ms Nadia Hughes, who was travelling on flight SA 060 to Lagos. The charges were soliciting a bribe, corruption and bringing the name of the SAA into disrepute.

- [8] It is evident from the transcribed record that the Applicant's representative raised an issue with hearsay evidence at the onset of the arbitration proceedings and the SAA's representative indicated that the passenger involved would be called as the main witness. On the premise that the passenger would be called as a witness, the arbitration proceeded with the other witnesses called by the SAA. The arbitrator recorded that the evidence of the witnesses would constitute hearsay evidence if it was not to be corroborated by the main witness.
- [9] The Applicant's first witness, Mr Sello Mnyamane (Sello), is the SAA's operations manager and he was the initiator at the Applicant's disciplinary enquiry. His testimony is irrelevant to a large extent for purposes of this application, as he testified in respect of procedural fairness, which is not an issue before me. Sello however explained that Ms Hughes testified at the disciplinary hearing after she was flown in from Lagos and stayed in a hotel for two nights at the SAA's cost.
- [10] Sello explained that the Applicant did not report to him directly, but that he reported to Ms Pinkie Bembe (Pinkie), a team leader. The incident of 19 April 2015 was brought to Sello's attention by Pinkie and Ms Nxalati Mtombeni (Nxalati), both team leaders. After the incident was reported to him, it was investigated and based on the outcome report, the Applicant was charged with misconduct.
- [11] In cross-examination, Sello testified that he never experienced problems with the Applicant and he conceded that he was not at the counter on 19 April 2015 when the incident allegedly occurred. Sello had no firsthand knowledge of the incident and he relied on what was presented in the investigation report and on what Pinkie and Nxalati reported to him. Initially he sat down with the Applicant and when he received the Applicant's explanation, he accepted that the Applicant had no reason to accept a bribe. However, Sello changed his

mind after he saw an electronic mail from Ms Hughes on 5 June 2015, as it corroborated what was said in the investigation report.

- [12] Sello was confronted with contradictions in the e-mail from Ms Hughes and the statement of Nxalati. In the e-mail Ms Hughes stated that she went to the ticketing desk and requested to speak to the supervisor. Ms Lindiwe was called, she heard the case and told Ms Hughes to send an e-mail. In Nxalati's statement, it was recorded that she and Pinkie wanted to find out what happened but Ms Hughes refused to engage them as she was scared that she would be disadvantaged. Sello was unable to explain why the passenger would refuse to engage when she made an allegation and there was an attempt from the supervisors to find out what had happened. It was put to Sello that Ms Hughes' refusal in the circumstances was material as she reported an alleged attempt of bribery and when the institution tried to find out what had happened, there was a refusal from the complainant to engage any further.
- [13] Sello explained that the allegation that the Applicant requested a bribe of R 250 from Ms Hughes was corroborated by other witnesses, namely Ms Tholoana Masombuka, Nxalati and Pinkie. He conceded that nobody actually heard the Applicant asking for a bribe and that they were only told about it by Ms Hughes.
- [14] The SAA booked a flight and accommodation for two days for Ms Hughes to testify at the Applicant's disciplinary hearing. Sello conceded that Ms Hughes stayed on much longer after the hearing as she indicated that she had other business to attend to in Johannesburg.
- [15] Ms Masombuka, a ticket sales agent, testified that her job entails selling tickets, upgrading of tickets and excess baggage charges. Ms Masombuka referred to the check in system that is used by the agents at the check in counter when they check in passengers and it shows the number of bags checked in by a passenger. In the event that a passenger has excess luggage, the passenger would be given a slip at the check in counter and would go to the ticket sales offices with the slip stating the number of bags he/she has as well as the number of excess luggage the passenger has to pay for.

- [16] Ms Masombuka testified that on an economy class ticket between South Africa and Lagos, a passenger is allowed three pieces of luggage, up to 23 kg per piece. Ms Hughes was travelling to Lagos with her child so they were allowed six pieces of luggage within the prescribed allowance. It is evident from the check in system that Ms Hughes had 8 bags with a total of 167 kg. She had two bags more than what she was allowed and the check in agent had to write a slip stating how many bags she had in excess and what amount she had to pay.
- [17] The overweight charge is calculated based on the information written on the slip.
- [18] On 19 April 2015, the Applicant was the check in agent that assisted Ms Hughes and he wrote the slip in respect of the excess luggage. On the said slip the Applicant indicated that Ms Hughes had seven pieces of luggage with a total of 149 kg and one piece of luggage in excess, meaning that Ms Hughes had to pay for one piece of excess luggage.
- [19] Ms Masombuka testified that when Ms Hughes came to her, she told her that in fact she had two pieces of luggage to pay for, notwithstanding the fact that the slip indicated only one piece of excess luggage. Ms Masombuka told Ms Hughes that she could not charge her for two pieces of luggage if the slip indicated one piece and she requested the passenger to go back to the check in counter to get a slip that indicated two pieces of luggage. Ms Hughes refused and said she did not want to interact again with the Applicant as her interaction was not pleasant because he asked her to pay for one piece of excess luggage and to put R 200 or R 250 in her passport when she brought it back to him.
- [20] After this was reported to her, Ms Masombuka called Nxalati, who was the closest team leader on duty on the day to deal with Ms Hughes. Nxalati addressed the passenger and Ms Masombuka could hear the conversation. Ms Hughes conveyed her unhappiness with SAA staff members and more particularly the Applicant. Ms Hughes was not happy about the fact that the Applicant asked her to pay for only one piece of excess luggage when she knew she had two pieces of excess luggage and was prepared to pay for it.

- [21] Nxalati and Pinkie wanted to address the matter immediately with the Applicant, but Ms Hughes refused as she did not want to have any further interactions with him and it was suggested that Ms Hughes not go back to the Applicant and that she should rather submit a complaint with the customer care department.
- [22] Nxalati went to the check in counter and when she came back, she told Ms Masombuka that she could charge the passenger for two extra pieces of luggage. In the end Ms Hughes was charged for two pieces of excess luggage and she paid R 700 per piece.
- [23] Nxalati testified that she is a team leader and that on 19 April 2015, Ms Masombuka at ticket sales called her and informed her that there was a passenger who wanted to talk to her about an incident that happened at the check in counter. Nxalati went to the ticket sales office and she met Ms Hughes, who told her that she had eight pieces of luggage to check in and that the customer services agent who assisted her, said he would charge her for only one piece of excess luggage and that, when she came back from the ticket sales, she must put money in her passport and give it to him. Nxalati asked the passenger which counter it was and Ms Hughes indicated counter B55, which was manned by the Applicant. Nxalati called Pinkie as she was the team leader to whom the Applicant reported to directly.
- [24] Ms Hughes told Pinkie what had happened and Nxalati and Pinkie decided to go back to the check in counter to confront the Applicant, but the customer refused to go back to him and to confront him, as she feared that she would be victimised. She feared that the Applicant would not load her bags or would arrange for someone to open or damage her bags.
- [25] Nxalati explained that a boarding pass could not be issued until the passenger has paid the overweight charges for any excess luggage. Once it is paid for, the passenger would go back to the check in counter and give the receipt to the check in agent, who would complete the check in process and issue the boarding pass. Ms Hughes went back to the Applicant to show him the receipt and to get her boarding pass, but she refused to go back for the purpose of dealing with the bribe issue. Nxalati explained that she could not and did not force the passenger to deal with the bribe issue at the counter as she wanted

to protect the passenger as well as the image of the SAA, as the Applicant acted on behalf of the SAA.

- [26] Nxalati testified that the Applicant issued a slip indicating that Ms Hughes had seven bags, when that was not the case. When she wanted to address the issue, the passenger was not happy to do it and she asked that she be allowed to travel safely and to receive all her bags on the other side and indicated that she would lodge a formal complaint once she got settled in Lagos.
- [27] Nxalati explained that the slip issued by the Applicant showed that Ms Hughes had to pay for one piece of excess luggage, which was R 700 instead of the R 1 400 that was payable for the two pieces of luggage and had the passenger not raised the issue, she would have paid for one piece only.
- [28] In cross-examination, it was put to Nxalati that the Applicant's evidence would be that Ms Hughes was unsure whether she had enough money to pay for the extra piece of luggage and she opted for it to be excluded on the slip, so that when she did not have enough money to pay for it, she would leave the one piece of luggage behind. Ms Hughes also wanted the Applicant to accompany her to the ticket sales office. Nxalati had no knowledge of this.
- [29] Pinkie testified that she is a team leader at O R Tambo International Airport and the Applicant reported directly to her. On 19 April 2015 Nxalati called her to be present while a passenger was relating a complaint in respect of the Applicant, as he reported to her. The complaint was that the Applicant tried to solicit a bribe. The passenger said that she knew that she had two pieces of luggage in excess and that she would be paying for those, but when she checked in, the Applicant wrote on the receipt that she had a total of seven pieces of luggage and that she had to pay for one piece. Ms Hughes wanted to pay for the two pieces of luggage and at the time, the luggage was still at the check in counter.
- [30] Nxalati checked the checking system to see how many bags Ms Hughes had checked in and she confirmed that she had a total of eight pieces of luggage and Ms Masombuka was ordered to make sure that Ms Hughes pays for two

pieces of excess luggage, and not only one as per the slip issued by the Applicant.

- [31] Pinkie testified that after Ms Hughes told her about the incident, she advised Ms Hughes that she could call the Applicant and tried to find out what had happened in her presence. Ms Hughes refused as she did not want anything to do with the Applicant, she did not trust the SAA staff and she was scared that even Pinkie and Nxalati were working with the Applicant, she conveyed that it was not her first experience where a SAA employee tried to solicit a bribe and she was scared that her luggage would not make it to Lagos.
- [32] Pinkie explained that on the day of the incident, she had an informal discussion with the Applicant, telling him that Ms Hughes complained about him but that she was not prepared to deal with the issue in the Applicant's presence and that she would lay a formal complaint. Pinkie indicated that they would wait for the final report, once the formal complaint is lodged, and take it from there. Ms Hughes sent an e-mail on 20 April 2015 complaining about the incident. The Applicant denied that the incident had happened but he has not given Pinkie his version of events.
- [33] Pinkie testified that Ms Hughes made it clear that she knew that she had two bags in excess and as she is a frequent flyer, she knew exactly how much she was supposed to pay and that she had known that at the time she left home. Ms Hughes never indicated that she was short of money and unable to pay for the excess luggage.
- [34] In cross-examination Pinkie explained that the excess slip issued by the Applicant corroborated what Ms Hughes had said in the sense that she had checked in eight pieces of luggage, when she was allowed six pieces in total, and the excess slip reflected seven pieces of luggage whilst the system showed that Ms Hughes checked in eight pieces of luggage. The excess slip has to be a true reflection and had to show that Ms Hughes had to pay for the extra two pieces of luggage.
- [35] It was put to Pinkie that the Applicant's version is that Ms Hughes asked the Applicant to leave out the one piece of luggage as she was not sure whether

she would have enough money to pay for it and in the event that she did not have enough money, she would have left the one bag behind.

[36] The SAA called not further witnesses and closed its case.

[37] The Applicant testified that he was employed by the SAA for a period of 15 years and on 19 April 2015, he was working at the check in counters. He explained that it was a hectic day as some staff members did not report for duty and the flight to Australia was cancelled, which caused long queues and passengers being sent to different counters. When Ms Hughes approached him, she said she hoped that he would not send her away and that as she was not on the flight to Australia, the Applicant could assist her. He testified that Ms Hughes said to him that he should charge her excess for two bags, as she previously paid before she did the check in. The Applicant explained to Ms Hughes that it did not work like that and that she could not pay prior to the check in process. He started the check in process and Ms Hughes asked him how much was the overweight amount and he told her that it was R 700 per piece, upon which she indicated that the previous time she paid R 350 per piece of excess luggage and the Applicant informed her that the rate had changed. Ms Hughes indicated that she had bought clothes and groceries and she was not sure that she had enough money to pay for the excess luggage. She said that she had R 700 as she had previously paid R 700 for two pieces of luggage.

[38] The Applicant explained that he had dispatched six pieces of luggage to be loaded, as Ms Hughes was entitled to that, and two pieces of luggage remained at the counter. He gave Ms Hughes a baggage slip for seven pieces of luggage, indicating that she should be charged for one piece because she was not sure if she had enough money to pay for both. Ms Hughes indicated that she had come with somebody who would go back with one piece of luggage in the event that she could not pay for it.

[39] The Applicant told Ms Hughes that she should explain to the person at the ticket sales office that she wanted to pay for two pieces of luggage. Ms Hughes asked him to accompany her to the ticket sales office, but he told her that it was not possible as there was a queue at his counter and he could not leave the passengers waiting. She left but came back and said that the queue

at the ticket sales office was too long and that she was travelling with a child and scared that she would miss her flight and she asked the Applicant to send all the pieces of luggage through to be loaded. He responded that he would do that once she can show him the receipt of what was paid for. Ms Hughes told the Applicant that he 'had an attitude'.

- [40] After approximately 45 minutes, Ms Hughes returned and she threw the receipt on top of his counter whilst he was busy with another passenger. The Applicant gave Ms Hughes her passport and boarding pass and after he had checked for how many pieces of luggage did she pay, and when he saw that she paid for the two extra pieces, all her luggage was loaded.
- [41] The Applicant disputed that anybody approached him about the incident on the same day or thereafter and his version was that he only became aware of the incident two days before he received the charge sheet in August 2015 when he was called to Pinkie's office to read the e-mail from Ms Hughes.
- [42] The Applicant denied that he had asked a bribe from Ms Hughes or that he participated in any act of corruption.
- [43] In cross-examination, the Applicant was asked why he wrote one piece of luggage on the slip when the passenger had indicated that she wanted to pay for two pieces of excess luggage. The Applicant explained that the passenger wanted to pay for two pieces of luggage at R 350 per piece and indicated that she did not have enough money to pay for two pieces at R 700 per piece. It was the SAA's case that the Applicant's version was improbable as Ms Hughes paid R 1 400 for two pieces of luggage, which is contradicting the Applicant's version that she only had R 700 to pay and could not pay more than that. The Applicant disputed that it was a contradiction and he explained that Ms Hughes said to him that she only had R 700 in cash and that she was not sure if she had enough credit available on her card, thus he advised her to explain to the ticket sales office and see if she could pay for all her excess luggage. If the passenger was only able to pay for one piece of luggage, the other piece of luggage would have been left behind.

Analysis of the arbitrator's findings and the grounds for review

- [44] The arbitrator was to determine the substantive and procedural fairness of the Applicant's dismissal. In respect of substantive fairness, the Applicant's case was that he was not guilty of the misconduct he was dismissed for and in respect of procedural fairness, his challenge was the fact that he was not afforded the right to be represented at his disciplinary hearing and the fact that he was not afforded an opportunity to plead in mitigation.
- [45] In his analysis of the evidence, the arbitrator recorded that regarding the complaint from Ms Hughes, the SAA adduced the evidence of Ms Masombuka, Nxalati and Pinkie. Ms Hughes did not testify and as a result there was no primary or first-hand testimony of what had transpired at the check-in counter, except what the Applicant said had happened and what had transpired. The SAA's evidence was bolstered with the baggage slip issued by the Applicant.
- [46] The arbitrator accepted that the evidence of the aforesaid SAA witnesses amounted to hearsay evidence because the witnesses only testified about what Ms Hughes told them. The arbitrator correctly stated that for hearsay evidence to carry weight and to be admitted as such, it has to be corroborated by the testimony of the primary witness. The SAA did not adduce the evidence of the passenger to corroborate the evidence of its witnesses.
- [47] Instead of dealing with the issue of hearsay evidence and considering the weight that could be attached to it, the arbitrator simply jumped to a point where he held that, notwithstanding the fact that the SAA's evidence was nothing more than hearsay evidence, he should consider the evidence in its totality in order to arrive at an appropriate decision.
- [48] The arbitrator briefly referred to the Applicant's evidence and found that, 'in view of the above-mentioned factors', the Applicant's version was highly improbable whilst the SAA's version was probable, coherent and unambiguous. This is so because the SAA's witnesses corroborated each other's testimony and they gave clear, simple and coherent evidence. The witnesses had no motive to fabricate something against the Applicant and the arbitrator found that there was clear and convincing evidence that the Applicant was guilty of the misconduct he was dismissed for and therefore, the sanction of dismissal was warranted.

- [49] The arbitrator found that the SAA proved, on a balance of probabilities, that a fair reason existed to justify the Applicant's dismissal.
- [50] The central event that led to the Applicant's dismissal, was the conversation that took place between the Applicant and Ms Hughes at the check in counter on 19 April 2015. The veracity and probability of the evidence in respect of the said event, depended upon the credibility of the Applicant and Ms Hughes respectively.
- [51] The gist of the Applicant's complaint and ground for review is the manner in which the arbitrator dealt with the evidence placed before him, and more specifically, the hearsay evidence. The question is whether the arbitrator committed a reviewable irregularity by placing reliance upon hearsay evidence in the manner that he did.
- [52] It is evident from the transcribed record that the arbitrator was made aware from the onset that the evidence of the SAA witnesses was hearsay evidence and that an issue was taken with such evidence, which was provisionally allowed on the basis and understanding that the primary witness, Ms Hughes, would testify to corroborate the SAA's version of events.
- [53] Hearsay evidence is defined¹ as evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence.
- [54] In terms of section 3(1) of the Law of Evidence Amendment Act² hearsay evidence shall not be admitted as evidence unless the parties agreed to the admission thereof as evidence, or the person upon whose credibility the probative value of such evidence depends, testifies at the proceedings or where the evidence is admitted in the interest of justice, having regard to seven specified factors.
- [55] *In casu*, there was no agreement between the parties that hearsay evidence be admitted.

¹ Section 3(4) of the Law of Evidence Amendment Act 45 of 1988.

² Act 45 of 1988.

- [56] Ms Hughes, the primary witness, never testified in the arbitration proceedings, thus, apart from the Applicant, there were no direct witnesses to the conversation between the Applicant and Ms Hughes.
- [57] The arbitrator found SAA's evidence to be hearsay and held that for the hearsay evidence to carry weight and be admitted as such, it had to be corroborated by the testimony of the primary witness. This finding is indeed correct and in accordance with the principles applicable to hearsay evidence.
- [58] Section 3(1)(3) of the Law of Evidence Amendment Act provides that hearsay evidence may be provisionally admitted if the court is informed that the person upon whose credibility the probative value of such evidence depends, will testify later in the proceedings. Provided that if such person does not later testify in the proceedings, the hearsay evidence should be left out of account, unless the hearsay evidence is admitted by agreement or is admitted in terms of section 3(1)(c) in the interest of justice.
- [59] However, after finding the SAA's evidence to be hearsay, the arbitrator found that the SAA proved on a balance of probabilities that the Applicant's dismissal was fair. On the strength of nothing more than hearsay evidence, the arbitrator found that the Applicant's version was highly improbable and the SAA's version to be probable, coherent and unambiguous.
- [60] Effectively the arbitrator found that what the SAA's witnesses were told by Ms Hughes and what constituted nothing more than hearsay evidence, was more probable and coherent than the direct evidence presented by the Applicant, who was present and involved with Ms Hughes at the check in counter and whose version of events as to what transpired between him and Ms Hughes at the check in counter could not and was not disputed.
- [61] The Applicant's case is that he was denied a fair hearing as the arbitrator took into consideration Ms Hughes written statement, notwithstanding the fact that she did not testify. The Applicant submitted that there was no way that he could have had a fair hearing as his evidence would have been improbable, regardless of what he tried to present at the arbitration hearing.
- [62] There was, in the absence of Ms Hughes as a witness, no evidence at all to support the SAA's case that the Applicant had solicited a bribe or was involved

in corruption. Not a single witness of the SAA could testify to this issue and their versions were limited to what they were told by Ms Hughes. How the arbitrator could make the finding that the SAA proved, on a balance of probabilities, that a fair reason existed to justify the Applicant's dismissal, is astonishing.

- [63] The only evidence in respect of the events at the check in counter, is the Applicant's evidence and his version in that regard remained unchallenged.
- [64] The arbitrator completely ignored the fact that Ms Hughes complained about the Applicant, but subsequently refused to confront the issue with the relevant supervisors as she did not want to interact with the Applicant again, yet after paying for her excess luggage, Ms Hughes returned to the Applicant to complete her check in procedure.
- [65] It is evident from the transcript that Ms Hughes in her e-mail complaint referred to one 'Lindiwe' and nobody who testified at the arbitration, knew who Lindiwe was. The arbitrator made it clear during the proceedings that Ms Hughes would testify to explain who Lindiwe was and to clear other discrepancies which were raised during the proceedings. This never happened.
- [66] There is merit in the Applicant's complaint that the arbitrator had failed to properly assess the evidence placed before him and to reasonably determine the issues.
- [67] The arbitrator made no assessment of the probative value of the evidence presented and he attached no weight to the Applicant's direct evidence and made no finding on what weight could be attached to the SAA's hearsay evidence. Notwithstanding these obvious misdirections and failures, the arbitrator accepted the SAA's version and rejected the Applicant's version.
- [68] In opposing this application, the SAA submitted that the Applicant laboured under the misapprehension that evidence should be excluded simply because it is hearsay. SAA's case is that the arbitrator identified the evidence as hearsay and formed the view that it would be in the interest of justice to admit such evidence. This is so because the proceedings arose in a labour context and the nature of the proceedings required the arbitrator to eschew formality, the nature of the evidence was essentially Ms Hughes e-mail complaint, which

was direct evidence, corroborated by the SAA's other witnesses, that the probative value of the evidence was high as it directly implicated the Applicant in corruption and that there were strong reasons why the evidence was not tendered by Ms Hughes. Furthermore, the Applicant has not alleged that he suffered prejudice and he suffered minimal prejudice from not being afforded an opportunity to cross-examine Ms Hughes. In fact, the Applicant failed to take advantage of several opportunities to interrogate Ms Hughes' statement and he had the opportunity to cross-examine her at the disciplinary hearing.

- [69] It is evident that the SAA considered the provisions of section 3(1)(c) of the Law of Evidence Amendment Act and made every effort to justify the arbitrator's acceptance of hearsay evidence in view of the provisions of the said section.
- [70] The difficulty with the SAA's submission is obvious. Firstly, it was indicated at the commencement of the arbitration that there was an objection to hearsay evidence, that it was made clear that Ms Hughes would testify and that the evidence of the other witnesses would be allowed provisionally and in anticipation of Ms Hughes' testimony. When she did not testify, the hearsay evidence should be left out of account, unless the hearsay evidence was admitted by agreement, which was not the case, or was admitted in terms of section 3(1)(c) in the interest of justice.
- [71] The SAA's argument is that the hearsay evidence was admitted in the interest of justice. The difficulty however is that before hearsay evidence could be admitted as evidence because the interests of justice demands its admission, all the factors listed in section 3(1)(c) must be assessed according to the circumstances of the case. It is the combined assessment of all the factors that will result in a proper application of section 3(1)(c)³. It is evident from the arbitration award that the arbitrator had no regard to the provisions of the Law of Evidence Amendment Act, let alone an assessment of the factors listed in section 3(1)(c) and that the interest of justice was not a justification for accepting hearsay evidence, as submitted by the SAA. The arbitrator accepted hearsay evidence because he was of the view that he had to consider the totality of the evidence in order to arrive at an appropriate decision.

³ The Law of Evidence in South Africa, Adrian Bellengere et al, Oxford University Press Southern Africa, Fourth edition, page 297 – 300.

[72] Secondly, the fact that the Applicant had the opportunity to cross-examine Ms Hughes at the disciplinary hearing is of no moment because the arbitration was a hearing *de novo*. This difficulty could have been overcome if the transcript of the disciplinary hearing was presented and the parties had agreed that the entire transcript should be regarded as evidence before the arbitrator, in which event the entire record could be considered and accepted as if it were evidence that was adduced before the arbitrator. The evidence given at the disciplinary hearing could then be regarded as evidence at the arbitration. This is not what happened *in casu*, and the SAA's reliance on the fact that the Applicant had the opportunity to cross-examine Ms Hughes at the disciplinary hearing, is misplaced.

The test on review

[73] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[74] I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. Viewed cumulatively, the arbitrator's failure to apply his mind to the issues and his acceptance of hearsay evidence in the manner he did, were material to the determination of the dispute and it distorted the ultimate decision made by the arbitrator. It cannot therefore be said that the arbitrator's decision was one that a reasonable arbitrator could have reached on the full conspectus of all the facts before him.

[75] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review.

⁴ 2007 28 ILJ 2405 (CC) at para 110.

[76] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that his dismissal was unfair, alternatively, the Applicant seeks an order remitting the matter for a hearing *de novo*.

[77] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.

[78] *In casu*, the Applicant's complaint is that he was not afforded a fair hearing. Where the complaint is that a party was deprived of a fair hearing, it is not appropriate to substitute the award, but rather to remit the matter for a hearing *de novo*. I am of the view that it would be in the best interest of the parties and of justice to have the matter properly ventilated and decided *de novo*.

[79] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.

[80] In the premises, I make the following order:

Order

1. The late filing of the application for review is condoned;
2. The arbitration award issued on 8 May 2016 under case number GAEK10374-15 is reviewed and set aside;
3. The dispute is remitted to the Second Respondent for a hearing *de novo* before an arbitrator other than the First Respondent;
4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms T Makgamatha of M M Mitti Inc Attorneys

For the Third Respondent: Advocate M Sibanda

Instructed by: Mothle, Jooma & Sabdia Inc Attorneys